

**COURT OF APPEALS
DECISION
DATED AND FILED**

February 5, 2013

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2012AP554-CR

Cir. Ct. No. 2010CF176

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

MICHAEL RICHARD SHONG,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Dunn County:
ROD W. SMELTZER, Judge. *Affirmed.*

Before Hoover, P.J., Mangerson, J., and Thomas Cane, Reserve
Judge.

¶1 PER CURIAM. Michael Shong appeals a judgment, entered upon a jury's verdict, convicting him of homicide by negligent operation of a motor vehicle. Shong challenges the sufficiency of the evidence to support his

conviction and also claims the trial court erred by denying his motion in limine to exclude evidence. We reject Shong's arguments and affirm the judgment.

BACKGROUND

¶2 The State charged Shong with homicide by negligent operation of a vehicle. The charge arose from allegations that while traveling on a rural Dunn County highway, Shong failed to stop at a controlled intersection and broadsided a car, killing its driver. A jury found Shong guilty of the crime charged. The court ultimately withheld sentence and placed Shong on three years' probation with jail time and community service as conditions. This appeal follows.

DISCUSSION

¶3 Shong challenges the sufficiency of the evidence to support his conviction. Whether the evidence supporting a conviction is direct or circumstantial, we utilize the same standard of review regarding its sufficiency. *State v. Poellinger*, 153 Wis. 2d 493, 501, 451 N.W.2d 752 (1990). We must uphold Shong's conviction "unless the evidence, viewed most favorably to the state and the conviction, is so insufficient in probative value and force that it can be said as a matter of law that no trier of fact, acting reasonably, could have found guilt beyond a reasonable doubt." *Id.* If there is a possibility that the jury "could have drawn the appropriate inferences from the evidence adduced at trial to find the requisite guilt," we must uphold the verdict even if we believe that the jury "should not have found guilt based on the evidence before it." *Id.* at 507.

¶4 Here, the State was required to prove three elements: (1) that Shong caused the death of another human being; (2) by criminal negligence; (3) in the operation of a motor vehicle. *See* WIS JI—CRIMINAL 1170 (2002). Criminal

negligence is defined as “ordinary negligence to a high degree, consisting of conduct that the actor should realize creates a substantial and unreasonable risk of death or great bodily harm to ... another.” WIS. STAT. § 939.25(1).¹

¶5 At trial, the jury heard that at around 7:25 p.m. on May 7, 2010, Shong was driving southbound on a rural Dunn County highway within the posted fifty-five miles-per-hour speed limit when he missed a stop sign and broadsided a car traveling on an uncontrolled, intersecting highway. The driver of the other vehicle, Geraldine Wendt, died instantly. In addition to being controlled by a stop sign, the road on which Shong travelled also had a posted “stop ahead” sign approximately 3,000 feet before the intersection. Shong told an emergency responder at the scene that he did not see the stop sign and later told police that he missed the stop sign because it was rainy and overcast. Shong also told police that he was driving from the Twin Cities and had exited I-94 six miles from the crash site. Shong further stated to police that he consumed one or two cans of beer and some food while driving on the rural highway.

¶6 Lynn Wendt, the victim’s husband and lone passenger in her car, testified that visibility was “good” at the time of the crash. A Dunn County deputy sheriff who immediately responded to the scene testified that conditions were normal, he had no problem with visibility, and both the “stop” sign and “stop ahead” sign were properly posted.

¶7 Shong presented two witnesses who testified he is a cautious driver who always stops for stop signs. Shong also introduced expert testimony to show

¹ All references to the Wisconsin Statutes are to the 2011-12 version.

that Shong's BAC of .036%, from a sample obtained two hours after the crash, was less than half the legal limit in Wisconsin. Extrapolating this result backward, the expert opined that Shong's BAC at the time of the crash would have been somewhere between .01% and .02%. The expert consequently opined that any effect from the consumption of alcohol shortly before the crash was "insignificant."

¶8 Shong also introduced the testimony of a "human factors psychologist" who discussed "inattention blindness." In the context of operating a motor vehicle, the psychologist explained that a driver could be scanning "back and forth" and not actually perceiving what is seen. The psychologist further noted that the driver's expectations, or environmental factors such as weather and lighting, can adversely affect a motorist's ability to notice a stop sign. The psychologist acknowledged on cross-examination, however, that a driver's ability to notice the surroundings may also be impaired by distractions such as eating or drinking while driving.

¶9 Shong contends that no reasonable jury could find him guilty beyond a reasonable doubt because the State failed to prove that he was drinking, eating or otherwise distracted at the time of the crash. According to Shong, at most, the State established only ordinary negligence for missing the stop sign. We disagree. Wisconsin case law acknowledges that a motorist may be charged and found guilty of negligent homicide for a death caused by running a stop sign, even where the motorist is otherwise operating normally and within the posted speed limit. *See State v. Barman*, 183 Wis. 2d 180, 201-02, 515 N.W.2d 493 (Ct. App. 1994) (upholding prosecutor's decision to charge negligent vehicular homicide for missing stop sign while operating within posted speed limit); *see also State v. Cooper*, 117 Wis. 2d 30, 33, 344 N.W.2d 194 (Ct. App. 1983) (upholding

negligent vehicular homicide convictions for motorist who ran red light while traveling five miles per hour under the posted speed limit).

¶10 Here, the jury heard testimony establishing that Shong missed not only the stop sign, but also the “stop ahead” sign that preceded the intersection. Although Shong told police that he missed the sign because it was rainy and overcast, there was witness testimony indicating that visibility was good. It is the jury’s function to assess the credibility of witnesses and reconcile any inconsistencies in testimony. *Morden v. Continental AG*, 2000 WI 51, ¶39, 235 Wis. 2d 325, 611 N.W.2d 659. Moreover, a jury is free to piece together the bits of testimony it found credible to construct a chronicle of the circumstances surrounding the crime. *See State v. Sarabia*, 118 Wis. 2d 655, 663-64, 348 N.W.2d 527 (1984). Further, “[f]acts may be inferred by a jury from the objective evidence in a case.” *Shelley v. State*, 89 Wis. 2d 263, 273, 278 N.W.2d 251 (Ct. App. 1979).

¶11 Based on the trial evidence, a reasonable jury could find that the crash occurred because Shong was not paying proper attention to his surroundings and went through the stop sign because he was distracted—perhaps by his consumption of food and drink—while driving on a rural highway. If the weather was less than ideal, the jury could reasonably find that Shong had extra incentive to pay closer attention to his surroundings. Although Shong denies that he was eating, drinking or otherwise distracted as he entered the intersection, the jury was not required to believe him. The evidence submitted at trial is sufficient to support Shong’s conviction.

¶12 Shong also argues the trial court erred by denying his motion in limine to exclude evidence. Whether to admit evidence is addressed to the trial

court's discretion. *State v. Pharr*, 115 Wis. 2d 334, 342, 340 N.W.2d 498 (1983). An appellate court will sustain an evidentiary ruling if it concludes that the circuit court examined the relevant facts, applied a proper standard of law and, using a demonstrative rational process, reached a conclusion that a reasonable judge could reach. *Loy v. Bunderson*, 107 Wis. 2d 400, 414-15, 320 N.W.2d 175 (1982). Evidence must be relevant to be admissible—it must relate to a fact of consequence to the determination of the action, and it must have a tendency to make that fact of consequence more or less probable than it would be without the evidence. See WIS. STAT. § 904.01. Evidence that is “part of the panorama of evidence needed to completely describe the crime that occurred, and is thereby inextricably intertwined with the crime,” is relevant. *State v. Dukes*, 2007 WI App 175, ¶28, 303 Wis. 2d 208, 736 N.W.2d 515.

¶13 Assuming it is relevant, the evidence is admissible if its probative value is not substantially outweighed by the danger of unfair prejudice or confusion of the issues. WIS. STAT. § 904.03. The evidence is unfairly prejudicial if it appeals to the jury's sympathies, arouses its sense of horror, provokes its instinct to punish, or causes the jury to base its decision on something other than the established propositions in the case. *State v. Davidson*, 2000 WI 91, ¶73, 236 Wis. 2d 537, 613 N.W.2d 606.

¶14 Here, Shong argues the court erroneously exercised its discretion by denying a motion to exclude Shong's admission to police that he consumed food and beer on the six-mile stretch of road between the interstate and the crash site. Shong contends this evidence was not relevant and unfairly prejudicial because he was not impaired by the alcohol and there was no evidence to prove he was drinking or eating at the time of the impact. We disagree.

¶15 This evidence was relevant because it provided the immediate context for the crash and had the tendency to prove a consequential fact—that Shong may have been distracted from driving safely, causing him to miss both the “stop ahead” and stop signs. Shong’s actions leading up to the crash are part of the panorama of evidence and are inextricably intertwined with the crime. *See Dukes*, 303 Wis. 2d 208, ¶28.

¶16 Shong nevertheless argues the evidence was unfairly prejudicial. Any prejudice, however, was ameliorated by the parties’ stipulation that Shong was not impaired by his alcohol consumption. Because the evidence was allowed to show only that Shong may have been distracted as he approached the intersection, its probative value was not substantially outweighed by any danger of unfair prejudice. The record demonstrates that the trial court had a reasonable basis for admitting the evidence.

By the Court.—Judgment affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.

